thamby's claim fails, and that his suit must be dismissed.

[The remainder of the judgment deals with the question as to whether on the facts the additional oral agreement had been proved to have been made, and the Chief Justice found it had not been proved.—Editor.]

[APPELLATE CRIMINAL JURISDICTION]

BURTON, J.

June 16, 1930.

POH BAH CHEET.....Appellant

vs.

PUBLIC PROSECUTOR.....Respondent

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 35 of 1930]

Preventive detention—Severity of sentence.

The fact that a convicted prisoner has undergone terms of imprisonment does not of itself justify sentence to a further term. All the circumstances of the case must be considered, including the magnitude of the latest offence. There is no provision for preventive detention in this country.

English law in *Percy Victor Knell*, 19 Cr. App. R. 169, followed.

Appellant in person.

A. Sleep, Deputy Public Prosecutor, for Respondent.

BURTON, J.—The accused was charged with picking the pocket of Wong Han in Hugh Low Street, Ipoh, on 2nd March, 1930. He was convicted by R. S. Jervoise, Esq., Magistrate, Ipoh, and sentenced to one year's Rigorous Imprisonment, with 12 strokes whipping to be followed by 2 years' police supervision.

I think there is no doubt that this conviction is correct. The accused has an unusually bad record. This is his eighth conviction since January, 1923, and many of the offences he has committed would appear from the sentences to be among the more serious that come before a Magistrate's Court.

The Magistrate thought this is a case for preventive detention, and imposed the maximum sentence in his power. But there is no provision for such detention in this country, and the Magistrate should have treated the offence on its merits.

It is an established principle that the Magistrate in passing sentence should take into account all the circumstances including the magnitude of the offence in respect of which he is passing sentence. Hewart, L.C.J. said in *Percy Victor Knell*, 19 Cr. App. R. 169.

> "It has been said again and again in this Court that the mere fact that a man has committed serious offences and suffered long terms of detention in respect of them is not in itself a reason for imposing a sentence of a long term afterwards because of the previous sentences when the offence charged is a minor offence."

On this principle I reduced the sentence to 3 months' R.I., and remitted the sentence of flogging. The order for police supervision is to stand.

[SPECIAL CRIMINAL JURISDICTION]

ELPHINSTONE, C.J.

August 21, 1930.

GURDIT SINGH.....Petitioner

[SELANGOR CRIMINAL APPLICATION No. 4 of 1930].

Criminal Procedure Code, 1926, Section 363 (i) (b)—Habeas Corpus.

A person is not improperly nor illegally detained when he has been sentenced to imprisonment by a Judge of the Supreme Court in a case properly brought before him, and it is not proper for another Judge of the Supreme Court to act under Section 363 of the Criminal Procedure Code to decide that question.

E. Pratt for the Petitioner.

B. G. Bradley, Deputy Public Prosecutor, for the Public Prosecutor.

The facts appear sufficiently from the judgment of Elphinstone, C.J.

ELPHINSTONE, C.J.—This is an application by a person who has been sentenced to three months' rigorous imprisonment by Mudie, J., for an order that he may be set at liberty under section 363 (b) of the Criminal Procedure Code.

The applicant was convicted of the offence of bringing a false charge. The magistrate ordered that he be bound over to keep the peace by a bond for a period of 6 months or in default to undergo 6 months' simple imprisonment. The applicant appealed against the conviction to the Court of a Judge. Mudie, J., dismissed the appeal against the conviction but set aside the order requiring the appellant to give security, and in lieu of that he sentenced the appellant to three months' rigorous imprisonment.

Section 363 (b) of the Criminal Procedure Code, under which the application is made, reads as follows:—

> "The Court of a Judge may whenever it thinks fit direct
>
> (1) that any person who.....
>
> (b) is alleged to be illegally or improperly detained in public or private custody within the limits of the Federated Malay States be set at liberty."

The petitioner is detained under the order of Mudie, J., a judge of the Supreme Court, who sentenced him to three months' rigorous imprisonment. It is to my mind impossible to say that the petitioner is either illegally or improperly detained. The order of Mudie, J., is the order of a judge in a case properly brought before him and until it is set aside by a Court of competent jurisdiction, must be taken to be valid. It follows that the applicant is not improperly or illegally detained and that section 363 does not apply.

I am confirmed in this view by the Indian decision of *Rameswar Khiroriwalla* v. *The King Emperor*, (1928) 32 C.W.N. 889. In that case a High Court Judge refused to admit an accused person to bail in the course of a trial. The accused person then applied to the Criminal Bench of the High Court for an order of release under section 491 of the Indian Criminal Procedure Code which corresponds to section 363 of the Federated Malay States Code. Rankin, C.J., in dismissing the application said:—

> "This bench is in no way a Court of Appeal from the learned Judge exercising the ordinary original criminal jurisdiction and grave inconvenience would arise if the same High Court should make an order for arrest and also for an order for release upon divergent views upon a question of jurisdiction. If this be possible so far as the Statute is concerned, it would be possible for a single judge to make an order overriding and nullifying an order of a Division Bench. A judge or a Bench which exercises powers under section 491 has no claim to any particular procedure so as to require that the Sheriff should execute no order made by another Judge or Bench inconsistent therewith. It would introduce an incurable confusion into practice and theory if it were laid down that a considered judgment of the High Court upon a question of its jurisdiction could be challenged before the same High Court under Section 491. In my judgment the circumstances that certain orders of this Court in its ordinary Original Criminal Jurisdiction are not appealable do not affect this matter. It appears to me that a case such as the present should be viewed on the principle that it would be good return to a writ in the nature of *Habeas Corpus* to show that the applicant during his trial at Sessions was being detained under an order of this High Court which has not been set aside or varied. These considerations do not apply to orders made by Courts other than the High Court."

It will be noticed that in *Rameswar's* case no appeal lay from the order of the judge, a condition which is also applicable to the present case.

There are also several English cases which decide that a writ of *Habeas Corpus* will not be issued where the applicant is detained under the authority of an order of the Supreme Court.

In *Ex parte Lees*, El. Bl. and El. 828, where an application was made to the Court of the King's Bench for a writ of *habeas corpus* for the purpose of quashing the conviction of the applicant by the Supreme Court of St. Helena, Lord Campbell, C.J., said:—

> "A writ of *habeas corpus* to the expediency of granting which we have also directed our attention, is not grantable in general, where the party is in execution on a criminal charge, after judgment, or an indictment according to the course of the Common law."

This general statement by Lord Campbell was approved by Mr. Justice Avory in the case of *Rex* v. *Governor of Lewes Prison*, (1917) 2 K.B. 254, which was an application for a writ of *habeas corpus* to test the legality of the conviction and the sentence of a field general court martial. The application was refused on the merits. But Avory, J., said:—

> "I only wish to add in case these proceedings should be regarded as an encouragement to persons who have been convicted of indictable offences to apply for writs of *habeas corpus* that Lord Campbell, C.J., said in *Ex parte Lees* that 'a writ of *habeas corpus* to the expediency of granting which we have also directed our attention, is not grantable in general, where the party is in execution on a criminal charge, after judgment, or an indictment according to the course of common law.' In my judgment that principle applies where a person has been convicted by a duly constituted court martial proceedings of which have been in due course confirmed by the competent authority."

If that doctrine applies to the conviction by the court martial, it must, I think, also apply to an order by a judge at the Supreme Court.

Then in *Re Richard Dunn*, 5 C.B. 215, the Court refused to grant a *habeas corpus* to bring up a prisoner under sentence of the Court of Queen's Bench for perjury in order to test the validity of the warrant of commitment. Wilde, C.J., in giving judgment said:—

> "It is perfectly clear that the remedy of the prisoner in this case, if any, is by writ of error. If we were to accede to this application,—which is certainly one of the

first impression—it would lead to consequences that never were contemplated. It would follow that every sentence pronounced by the Court of Queen's Bench would be subject to be reviewed summarily by a judge at chambers."

In *Re Francis Robert Newton*, 16 C.B. 97, where the prisoner was convicted of wounding at the Central Criminal Court, application was made for a writ of *habeas corpus* on the ground that the offence charged was committed in a place outside the jurisdiction of that Court. Again the Court refused the application holding that the prisoner's remedy was to proceed by writ of error. Jervis, C.J., said:—

> "Failing that remedy, the party cannot question the truth of the record upon a *habeas corpus*. This does not leave the the party wholly without redress; he may obtain it from the prerogative of the Crown. He may make application to the Secretary of State. Possibly that course has already been resorted to without success (Hodgson intimated that this was the fact). I am clearly of opinion that this application is as groundless as it is unprecedented."

I am satisfied that proceedings under section 363 do not apply where the applicant is detained under an order of a judge of the Supreme Court. The application is, therefore, dismissed. I make no order as to costs.

[ORIGINAL CIVIL JURISDICTION]

BURTON, J.

September 6, 1930.

K.A.L.R.M. KARUPPAN CHETTIAR...Plaintiff

vs.

SUBRAMANIAM CHETTIAR
THE OFFICIAL ADMINISTRATOR, F.M.S.
PALANIAPPA CHETTIAR
MUTHUKARUPPAN CHETTIAR } **Defendants**

[PERAK CIVIL SUIT No. 370 of 1930]

Probate and Administration Enactment 1920, Section 30 — Construction — Powers of Official Administrator.

By the true construction of Section 30 of the Probate and Administration Enactment 1920, the official administrator is merely placed in the position of a receiver of the intestate's estate pending the grant of letters of administration, and he cannot be sued by virtue of this section alone.

S. H. Lewis for Plaintiff.

S. Seenivasagam for Defendant No. 2.

BURTON, J.—This action is a partition action, and it is necessary that all parties should be before the Court. Ramasamy Chetty is however dead and no one has been appointed his representative. The plaintiff has therefore sued the Official Administrator as "the person in whom is now vested the property of V. R. M. L. Ramasamy Chettiar deceased lately carrying on business in the Federated Malay States under the style of L. N." The plaintiff relies on Section 30 of the Probate and Administration Enactment 1920.—

> "From and after the decease of persons dying intestate and until letters of administration shall be granted in respect of their estates and effects, the estates and effects which were of such deceased persons shall be vested in the Official Administrator."

This section corresponds with section 19 of the Court of Probate Act, 1858 (21 and 22 Vict. Cap. 95) which vests the property in the Judge of the Court of Probate.

I do not think that Section 30 can be interpreted to mean that the Official Administrator can be sued in respect of an intestate estate without more. In *Chan Kit San* v. *Ho Fung Hang*, (1902) A.C. 257, the Privy Council held that the effect of the corresponding section in a Hong Kong Ordinance was to put the Official Administrator in the position of a Receiver of the intestate's estate pending the grant of letters, but without power to sue in respect thereof. I think it is clear too that he cannot be sued by virtue of this section. The section does not give him the power of an administrator and he could not administer an estate vested in him under this section without further order. If it were otherwise section 29 would be largely superfluous. I think therefore that the Official Administrator is wrongly joined and I order that he be dismissed from the action, with costs.

[ORIGINAL CIVIL JURISDICTION]

MUDIE, J.

October 4, 1930.

P. L. A. L. N. ALAGAPPA CHETTY.....Plaintiff

vs.

BAN JOO LEE & CO.
LI KIM CHUAN } **.....Defendants**

[NEGRI SEMBILAN CIVIL SUIT No. 224 of 1929]

Limitation Enactment 1896, Second Schedule Art. 77—"Other relief" in consequence of fraud.

Article 77 in the second schedule of the Limitation Enactment is wide enough to include an action for damages for deceit. The "other relief" referred to in that article need not be of the same kind, as "setting